Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM,

NO. 79-1869

S & M MATERIALS COMPANY,
Petitioner,

versus

SOUTHERN STONE COMPANY, INC.,
Respondent,

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cliff Food Stores, Inc. vs. Kroger, Inc., 417 F 2d 203 (5th Cir. 1969) ---------- 4,7

Gulf Oil Corp. vs. Copp Paving Co., 419 U.S. 186, 95 S.Ct. 392, 42 L Ed. 2d 378 (1974) ---------- 4,6

Hiram-Walker, Inc. vs. A & S Tropical, Inc., 407 F2d 4 (5th Cir.) cert. denied, 396 U.S. 901 (1969) ---------- 4,7

Littlejohn vs. Shell Oil Co., 483 F2d 1140 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116 (1973) ---------- 4,7

S & M Materials Co. vs. Southern Stone Co., Inc., 612 F2d 198 (1980) ---------- 5,6,7, 8,9

REPLY BRIEF OF PETITIONER

In light of the fact that the Respondent, SOUTHERN STONE, has prematurely undertaken to argue the facts of this case at a time when it is only proper to argue the necessity for the Writ of Certiorari, Petitioner, S & M MATERIALS COMPANY, feels it only reasonable to respond to that argument.

SOUTHERN STONE states at Page 5 of its Brief that the instant application should be denied because S & M MATERIALS has not described, for this Court, an interstate transaction. Even though it is obviously unclear to SOUTHERN STONE, S & M MATERIALS understands that the record is not now before the Court and that any cite to the record would be futile. Nevertheless, S & M MATERIALS is compelled to answer SOUTHERN STONE'S comments.

The Fifth Circuit Court of Appeals recognized that SOUTHERN STONE was indeed involved in interstate commerce and, in fact, sold dolemite limestone rock, the relevant product, to foreign buyers:

> "Although Appellee has sold dolemite rock to foreign buyers Appellant itself is a Georgia corporation — the domiclile of the purchaser is not controlling."

The Court further recognized SOUTHERN STONE's blatant intent to destroy S & M MATERIALS through the use of discriminatory pricing:

> "But when Appellee (Southern Stone) learned that Appellant (S & M MATERIALS) was manufacturing agricultural lime and selling it as a horizontal competitor, Appellee raised Appellant's price — and Appellant's price alone — for dolemite rock for slightly less than 50%. Appellant circumvented this action for a time by engaging one Bi-City Concrete Co. secretly to act as a broker, purchasing dolemite rock from Appellee (at the normal price) and immediately reselling it to Appellant. Appellant soon got wind of this scheme, however, and increased Bi-City's price, too."

Bi-City Concrete Co. was also a foreign buyer, having its office and plant in Georgia, SOUTHERN STONE learned that S & M MATERIALS was secretly buying the dolemite rock (at the old price) thru Bi-City Concrete Co., only because SOUTHERN STONE's salesman happened to call on Bi-City Concrete Co. on a routine sales trip. SOUTHERN STONE's salesman crossed the State line (Alabama into Georgia) to call on Bi-City Concrete Co. Bi-City Concrete Co. sent its check across the State line (Georgia into Alabama) to pay for the dolemite rock.

Nothing could be more clearly demonstrate SOUTHERN STONE's manifest intent to run S & M MATERIALS out of business. SOUTHERN STONE succeeded.

This is not simply a game of semantics as SOUTHERN STONE would have the Court believe. Actually, SOUTHERN STONE's somewhat lengthy discussion of interstate "sales" as opposed to "transactions" is

totally unnecessary unless it is to exhibit SOUTHERN STONE's confusion of the question at hand. We are not concerned with any difference, real or imagined, between sales and transactions.

The question to be decided is whether it is absolutely necessary that the "relevant commodity" physically cross a State line before a transaction will be considered interstate commerce within the meaning of the Robinson-Patman Act. This Court has never answered that question. SOUTHERN STONE tries to lead the Court to believe that it has indeed answered that question by a statement made in the next to the last paragraph of SOUTHERN STONE's Brief, but, of course, SOUTHERN STONE is unable to support that assertion with any authority declaring that "the product must at some stage necessarily cross a State line."

What this Court and other Courts of Appeal have said is that one of the transactions or one of the sales must cross a State line. The position, therefore, of S & M MATERIALS in this application is relatively simple.

There are many phases of every sale and every transaction. There is the Seller and there is the Buyer, each of whom, of course, have a domicile. There is the initial solicitation of the order which can involve, as it did in the instant case, salesmen soliciting orders from customers in a State other than the Seller's home State. In the instant case, SOUTHERN STONE sent salesmen to Georgia to solicit orders. On one of these sales trips, SOUTHERN STONE's salesman learned that S & M MATERIALS was secretly buying the dolemite rock (at the old price) from Bi-City Concrete Co. The price to Bi-City Concrete Co. was then immediately raised nearly 50%.

Jurisdiction under the Robinson-Patman Act depends on the existence of a sale "in commerce" of dolemite rock. That is what we have here. What we do not have here is physical movement of the dolemite rock itself across the State line. If the rule is going to be that jurisdiction under the Robinson-Patman Act depends solely on the physical movement of the relevant product across a State line then this Court needs to say just that. As it stands right now, the Fifth Circuit says that is what this Court says is the rule. The Fifth Circuit interprets this Court's ruling in *Gulf Oil Corporation vs. Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed. 2d 378 (1974) as saying:

> "However anachronistic it may today seem, the cases establish that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a State line. See *Gulf Oil Corporation vs. Copp Paving Co.*, 419 U.S. 186, 95 S. Ct. 392, 42 L.Ed. 2d 378 (1974), quoting *Hiram-Walker, Inc. vs. A. & S Tropical, Inc.*, 407 F2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed. 2d 177 (1969); *Littlejohn vs. Shell Oil Co.*, 483 F2d 1140, 1144 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L. Ed.2d 743 (1973); *Cliff Food Stores, Inc. vs. Kroger, Inc.*, 417 F2d 203, 208-10 (5th Cir. 1969)."

If the cases cited are reviewed, it can be easily seen that the cases just do not say what the Fifth Circuit claims they say. No Court has even gone so far. No Court has ever singled out one component of a business transaction and required that *it alone*, be *the* factor which must be in-

terstate in nature. The decision rendered in *S & M Materials Co. vs. Southern Stone Co., Inc.*, 612 F2d 198 disgresses from all precedence. It stands alone and unsupported in the area of Robinson-Patman decisions.

A look into the extent of this disgression in the law accurately delieniates what the decision has done.

A transaction is undoubtedly comprised of many varied and equally vital component parts. A transaction is truly not a transaction without each and every one of those component parts. There is the initial contact between the buyer and the seller; perhaps in the form of advertising or in the instant case, personal solicitation by agents of the seller. There is the offer and there is the acceptance of the offer. Often, there is between these two phases a series of negotiations, which, themselves, may be interstate in nature, as in the case at bar where negotiations were made via instrumentalities of interstate commerce, namely, the telephone and the United States mail service.

Another phase of a normal "transaction" involves payment. The payment procedure may have interstate qualities in that the request for payment and the actual payment may cross State lines. And, of course, there is the phase of the transaction which involves delivery of the goods. This is the phase which has been immortalized by the Fifth Circuit in *Southern Stone*, supra.

The decision has, in essence, established the completely novel legal principal that regardless of the overpowering "interstate" nature of the various phases of a transaction and regardless of whether a majority of the phases of the transaction crosses a State line, if the relevant product

does not literally travel across a State line, there is no interstate transaction at all. That principal is not supported by any prior decision of the Fifth Circuit or the United States Supreme Court. The *Southern Stone* decision has rewritten the law so as to make one phase of a transaction, and that phase alone, determinative of the interstate character of the transaction as a whole.

The decision in *Southern Stone* cites several cases in support of its "new law" but upon analysis it can be readily observed that the cases cited to not support the Court's decision. The cases do not establish that the state of "being in commerce under Section 2(a) requires physical movement of the relevant product across a State line."

Gulf Oil Corporation vs. Copp Paving, 419 U.S. 186, 95 S. Ct. 392 (1974), in no way indicates that the relevant product must itself cross a State line. That decision alines itself with other relevant decision by holding that the *transaction* must cross a State line.

> "With almost perfect consistency, the Courts of Appeals have read the language requiring that 'either or any of the purchases involved in such discrimination be in commerce' to mean that Section 2(a) applies only where 'at least one of the two *transactions* which, when compared, generate a discrimination . . . cross[es] a State line." (Emphasis supplied.)

No mention at all is made in regard to a relevant product crossing a State line. The *Gulf Oil* case cannot reasonably stand for that principle. It is not even addressed as an issue by the Court.

The same holds true for *Hiram-Walker, Inc. vs. A & S Tropical, Inc.* 407 F2d 4(5th Cir. 1969), the case from which the Court in *Gulf Oil* quoted:

> "At least one of the two transactions which when compared, generate a discrimination, must cross a State line." *Hiram-Walker,* at 9.

Another case cited by the Court in the *Southern Stone* decision in support of its opinion is *Littlejohn vs. Shell Oil Co.*, 483 F2d 1149 (5th Cir. 1973), but in actuality this case does not support the Court's position at all. It states, quoting from *Hiram-Walker:*

> *"At least one of the two transactions which when compared, generate a discrimination, must cross a State line."*

And lastly, the Court cites Cliff Food Stores, Inc. vs. Kroger, Inc., 417 F2d 203 (5th Cir. 1969). That case as well does not support the Fifth Circuit's opinion. It states, quoting from *Hiram-Walker:*

> "At least one of the two transactions which when compared, generate a discrimination, must cross a State line."

In the transactions which are the bases for the case at bar, enumerable facets of the transactions were engulfed in characteristics of interstate commerce.

S & M MATERIALS was a Georgia corporation with its principal place of business in the State of Georgia. Bi-City Concrete is a Georgia corporation with its principal place of business in the State of Georgia. SOUTHERN STONE, of course, is an Alabama corporation with its principal place of business in the State of Alabama.

The telephone and United States mail service were both used by SOUTHERN STONE and its agent to negotiate the sales to Bi-City Concrete and S & M MATERIALS. SOUTHERN STONE even sent one of its salesmen to Georgia, from Alabama, to solicit business and customers.

After the sales were made, even the payment for those sales had qualities of interstate commerce. Payment traveled from the Georgia customers across the State line to the Alabama seller.

Reason dictates that in a transaction such as this, where all aspects, save one, of the transactions have interstate characteristics, that the transaction, as a whole, should be considered a transaction which crosses a State line. That is precisely what the outcome would be if the principal of stare decisus were followed here. However, the Fifth Circuit in *Southern Stone* rules otherwise, The Fifth Circuit decision has developed a new and narrower rule.

The new rule requires that you first disregard all phases of the transaction except for the delivery of the product. Under the new rule, delivery is the only phase with which you are concerned. If delivery of the product is made across the State line, the transaction is interstate commerce. If delivery does not cross the State line, the transaction is not interstate commerce.

S & M MATERIALS does not take issue with any of the cases cited by the Fifth Circuit or the rules they stand for. S & M MATERIALS is simply pointing out to the Court that not a single one of those cases can by any stretch of the legal imagination support the Fifth Circuit rule in this case, that it is absolutely necessary that the relevant product literally cross a State line in order that the entire transaction be considered interstate commerce for the purposes of the Robinson-Patman Act.

Logically, one would consider all phases of the business transaction or sale and determine if, as a complete transaction, that transaction has more interstate characteristics than it has local characteristics. That is the only reasonable interpretation of the rule that a "transaction" or "sale" must cross a State line. Yet, the Fifth Circuit Court of Appeals has now said that you do not consider the transaction or sale as a whole but rather you look only to a single element of that transaction, the delivery phase, and if that phase is interstate in nature, there is an interstate sale. The Fifth Circuit has diverted from the rule as it has developed over the years and pronounced that it is not the transaction or sale which must cross a State line, it is now the delivery of the relevant commodity which must cross.

That is the core of the issue here. This Court needs to lend it guidance to the discord which has arisen between the cases precedent and the instant case. Only this Court can revive the uniformity which is so desperately needed.

CONCLUSION

The Fifth Circuit Court of Appeals has developed a rule which can be found in no case precedent. As a result of the lack of precedent, there is discord in the rule as stated by the Fifth Circuit and the rule as stated in other Courts of Appeals and this Court. The granting of the Writ of Certiorari will give this Court an opportunity to decide once and for all whether it is this Court's rule or whether it is the rule as established by the Fifth Circuit which is controlling in litigation under the Robinson-Patman Act.

It is for these and the foregoing reasons that the Petitioner respectfully requests this Court to grant its application for a Writ of Certiorari so that these issues may be settled once and for all.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have this date served three printed copies of the within and foregoing Reply Brief of Petitioner upon William B. Hardegree, attorney for Southern Stone Company, Inc. by depositing same in the United States mail, return receipt requested, properly addressed to said attorney for Respondent at his said address.

This the 6th day of June, 1980.

Charles A. Gower, Attorney for
S. & M Materials Company